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No. 96-2036

In The

Supreme Court of the United States

October Term, 1996

William Winston Waugh,

Petitioner,

vs.

Internal Revenue Service,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

BRIEF FOR THE PETITIONER IN REPLY

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ARGUMENT

Respondent asserts on page 11 of its Brief in Opposition to petition for certiorari that "the decision in this case [i.e., the Eighth Circuit's decision below] does not conflict with the decision of the Fifth Circuit in In re Quenzer, 19 F.3d 163 (5th Cir. 1993)." Respondent stresses the following point to reach this curious conclusion--"the government [in Quenzer] did not contend that the literal terms of Section 108(c) of the Bankruptcy Code and Section 6503 of the Internal Revenue Code tolled the priority periods of Section 507(a)(8)(A)." (Resp. Br. at 11-12).

> In the district court the government successfully relied on the suspension provision in section 108(c) of the Bankruptcy Code as the basis for tolling the priority period for the collection of taxes during the prior bankruptcy proceedings. Under the plain language of section 108(c), however, that suspension applies only to nonbankruptcy law and nonbankruptcy proceedings. Absent some other basis for tolling the section 507 time limit, the Quenzers' tax liability for the years 1984 and 1985 must be discharged.

Quenzer, supra at 164.[1]

Nothing upon the face of the *Quenzer* opinion nor the record in this case supports Respondent's contention that it abandoned the argument upon which it won the *Waugh* case below--i.e., that 11 U.S.C. §108(c) and 26 U.S.C. §6503 together act to toll the priority periods in 11 U.S.C. §507(a)(8)(A) for the duration of prior bankruptcies. To the contrary, the *Quenzer* opinion clearly indicates that Respondent utilized said argument in the district court and that said argument was considered by the Fifth Circuit. Under any fair reading of the *Quenzer* and *Waugh* opinions, there is no question that the two conflict.

In straining to explain away the conflict apparent upon the face of the Fifth and Eighth Circuit opinions, Respondent states that it conceded in the Fifth Circuit case of Quenzer that the literal terms of Sections 108(c), 507 and 6503 do not themselves compel suspension of the priority period and went forward merely on the basis of the general equitable powers of bankruptcy courts under 11 U.S.C. §105(a). (Resp. Br. at 12). Why would Respondent abandon the argument upon which it had won in one prior circuit court[2] and the district below? The only logical conclusion is that Respondent believed the 11 U.S.C. §108(c) argument to be flawed.

This may explain why Respondent, after first setting forth the contentions of Petitioner herein, leads the "Argument" section of its brief with a lengthy discussion of the merits of 11 U.S.C. §105(a) as a ground for affirming the Eighth Circuit's decision below. It is unnecessary for Petitioner to reply to the merits of Respondent's Section 105(a) argument. As was the case in *Quenzer,* Respondent has failed to properly raise the Section 105 argument in the trial court. *Waugh v.* IRS, 76 A.F.T.R.2d 95-7059, footnote 8 (D.Minn. 1995)(Pet. App. A11, 17)--

This basis [i.e., 11 U.S.C. §105(a)], while accepted by the Tenth Circuit in *In re Richards,* 994 F.2d 763, 765-66 (10th Cir. 1993) in embracing Appellee's position in this case, **has not been argued by the parties and is not central to the case at bar.**

supra (emphasis added); See *Taylor v. Freeland & Kronz,* 503 U.S. 638 (1992).

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[1] The Eighth Circuit clearly reached a contrary conclusion--

> Therefore, we conclude that the three-year priority period of section 507(a)(8)(i) is suspended by 11 U.S.C. §108(c) and 26 U.S.C. §6503(b) and (h), for the time that the automatic stay prevents the IRS from collecting outstanding tax debts.

Waugh v. Internal Revenue Service, 109 F.3d 489 (8th Cir. 1996)(Pet. App. A8).

[2] *In re Montoya,* 965 F.2d 554 (7th Cir. 1992).

CONCLUSION

The Court should grant certiorari herein to resolve a split in the circuits regarding the proper interpretation of Bankruptcy Code §108(c) and to reverse the Eighth Circuit's use of legislative history to create an ambiguity in an otherwise clear statute.

Respectfully submitted,

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